No. 59

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

BOARD OF TRADE OF THE CITY OF CHICAGO,
Appellant,

vs.

UNITED STATES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR APPELLANT

HAROLD E. SPENCER
RICHARD M. FREEMAN
One North LaSalle Street
Chicago 2, Illinois
Counsel for Board of Trade of the City of Chicago, Appellant

BELNAP, SPENCER, HARDY & FREEMAN
One North LaSalle Street
Chicago 2, Illinois
Of Counsel

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL.

TABLE OF CONTENTS

CITATIONS

Cases:

PAGE

Statutes:

Miscellaneous:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 59

BOARD OF TRADE OF THE CITY OF CHICAGO,
Appellant,

vs.

UNITED STATES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the district court (R. 74-80) is reported at 209 F. Supp. 744. The Commission's opinion (R. 9-29) is reported at 310 I.C.C. 437.

JURISDICTION

The judgment of the three-judge district court (R. 81) was entered September 18, 1962. A timely notice of appeal was filed by appellant (R. 85-87). The Court noted probable jurisdiction on June 17, 1963, and ordered that this

appeal and the appeal in No. 58 be consolidated (374 U.S. 823; R. 837). The Court's jurisdiction on direct appeal is conferred by 28 U.S.C. § 1253 and § 2101(b) and is sustained by *Interstate Commerce Comm.* v. *Mechling*, 330 U.S. 567 (1947); *Dixie Carriers* v. *United States*, 351 U.S. 56 (1956); and *Mechling Barge Lines* v. *United States*, 368 U.S. 324 (1961).

STATUTES INVOLVED

This appeal involves the national transportation policy, preceding 49 U.S.C. § 1, and sections 3(1), 4(1) and 13(1) of the Interstate Commerce Act, 49 U.S.C. §§ 3(1), 4(1), and 13(1). The text of those provisions is set forth in Appendix A, *infra*, pp. 39-41.

QUESTION PRESENTED

May the Interstate Commerce Commission, over the protest of affected shippers and localities, authorize rail carriers to maintain rates which depart from the long-and-short-haul provision of section 4 of the Interstate Commerce Act, without considering and determining whether such fourth-section-departure rates would violate section 3(1) of the Act by causing undue prejudice against such shippers and localities?

STATEMENT OF THE CASE

THE BACKGROUND AND NATURE OF THE CONTROVERSY[1]

This appeal involves the validity of the Interstate Commerce Commission's Fourth Section Order No. 19346 (FSO No. 19346), entered June 8, 1960 (R. 29-30). That order authorized rail carriers to continue, or to establish and maintain, over existing all-rail routes for the transportation of corn products from origins in northern Illinois on the New York Central Railroad's (NYC) Kankakee Belt line between Moronts and Van's Siding, Ill., to points in central, trunkline, and New England territories, herein referred to as the East, combination rates composed of proportional rates to and from Kankakee, Ill., without ob-

[1] The following definitions will be helpful to an understanding of this controversy.

Flat rate—A rate of unrestricted application which is not dependent upon any prior or subsequent transportation.

Proportional rate—A rate which is restricted to apply only on traffic having a prior or subsequent movement, or both. Such rates may also be restricted as to the type of prior or subsequent movement, as, for example, ex-barge proportional rates or ex-rail proportional rates.

Local rate—A rate which applies only over the lines of a single carrier. A local rate can be either a flat or a proportional rate.

Joint rate—A rate which applies over the lines of two or more carriers. A joint rate can be either a flat or a proportional rate.

Single-factor rate—A rate published as one rate from a named origin to a named destination. A single-factor rate can be either a local or a joint rate. If a joint rate, it must be concurred in by all carriers participating in the rate.

Combination rate—A total rate composed of two or more separately established rates. The individual component rates may be rates of any character.

Transit—The privilege of stopping grain or grain products for storage or processing and subsequent reshipment under a rate which applies from origin to destination as if the shipment had not been so stopped. The various transit privileges granted by the carriers are set forth in special transit tariffs which also prescribe the rules and regulations under which such privileges are granted.

serving the long-and-short-haul provision of section 4 of the Interstate Commerce Act (R. 10).[2]

Section 4(1) of the Act (Appendix A, page 40) prohibits the railroads from charging any greater compensation in the aggregate for the transportation of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included in the longer distance. However, "upon application to the Commission and after investigation," carriers may, "in special cases," be authorized to charge less for a longer than for a shorter haul.

Prior to December 15, 1956, the flat rate on grain and grain products from stations on the Kankakee Belt line to both Kankakee and Chicago ranged from 16.5 cents from Van's Siding to 23 cents from Moronts. There were also in effect from stations on the Kankakee Belt line to the East single-factor rates which applied via either Kankakee or Chicago, the rates being the same via either route. These single-factor rates were based on the so-called Chicago combinations. For example, on December 14, 1956, to New York, N.Y., an important representative destination in the East, the single-factor rate on grain from Union Hill, Ill., a representative origin on the Kankakee Belt, via both Chicago and Kankakee, was 68 cents, which was equal to the local rate of 19 cents on grain and grain products to Chicago plus a proportional rate of 49 cents on grain from Chicago to New York, the latter rate being known as the Chicago proportional rate.[3] While the local rates to Chicago and Kankakee applied on both grain and grain products, the Chicago proportionals and the single-factor rates

---

[2] The location of the Kankakee Belt line is shown at page 116 of the record. Its location with respect to the Illinois Waterway is shown at page 115 of the record.

[3] All rates and differences, unless otherwise stated, are in cents per 100 pounds.

on grain products from Illinois to the East were uniformly one-half cent per 100 pounds higher than the rates on whole grain.

Effective December 15, 1956, the NYC established a proportional rate of 5 cents on corn to Kankakee from all stations on the Kankakee Belt line between Van's Siding and Moronts, applicable, however, only on corn milled in transit into certain selected corn products and applicable only on traffic to the East. The milling-in-transit requirement thus confined the low rate to a select list of corn products moving under transit. In order to permit the reduced combinations to apply, the NYC cancelled the single-factor rates on corn and corn products from stations on the Kankakee Belt line to the East.[4] This also had the effect of changing the form of the rates on whole corn from single-factor rates to combination rates but without changing the level of the rates.

Using the rates from Union Hill to New York as illustrative, the situation was as follows:

RATES ON CORN AND CORN PRODUCTS FROM UNION HILL, ILL., TO NEW YORK, N. Y.

	December 14, 1956		December 15, 1956	
	Corn (Cents)	Products (Cents)	Corn (Cents)	Products (Cents)
Single-factor rates				
Via Chicago	68	68.5	None	None
Via Kankakee	68	68.5	None	None
Chicago combinations	68	68.5	68	68.5
New Kankakee combinations	—	—	68	54.5

The new Kankakee combinations applied on certain routes through Chicago, but only on a select list of corn

[4] The single-factor rates had to be cancelled to permit the reduced combinations to apply. Under the Commission's tariff rules, whenever a single-factor rate is published over a particular route, that rate applies to the exclusion of any combination of rates, whether the combinations are lower than, higher than, or the same as, the single-factor rates. (49 CFR 141.55(a)).

products, no change being made in the level of the rates on corn. Thus, where the prior rates on corn products were uniformly one-half cent higher than the rates on corn, the new reduced rates on the select list of corn products became much lower than the rates on corn. From Union Hill to New York, for example, as shown in the foregoing table, the rate on corn products became 13.5 cents lower than the rate on corn.

The effect of the milling-in-transit requirement, for all practical purposes, was to prevent Chicago grain merchants and elevator operators from buying whole corn off the Kankakee Belt. When corn moves from a station on the Kankakee Belt to Kankakee or Chicago, the local rate is paid. The inbound charges are deducted from the invoice price and are borne by the country shipper. But, on and after December 15, 1956, the processor at Kankakee could take advantage of the 5-cent proportional rate, knowing that, when the corn was processed and shipped out as corn products, it would secure a credit for the difference between the local rate paid in and the 5-cent proportional. This processor could, therefore, buy corn on the basis of the 5-cent rate. Because the function of a grain merchant or terminal elevator operator is to buy all corn offered without knowing how that corn will eventually be disposed of, Chicago grain dealers and elevator operators, who supply whole corn to many different types of customers at a wide variety of locations, could not buy any substantial quantity of corn off the Kankakee Belt with a sure knowledge that such corn could be sold to an intermediate processor. Thus Chicago grain dealers and elevator operators could not buy on the basis of the 5-cent rate and thus they could not compete with the processor

at Kankakee and a few other processors routing their traffic through Kankakee.[5] Furthermore, there are many users of corn in the East who do not utilize milling-in-transit arrangements and the members of the Board of Trade could not sell corn to these customers on the basis of the 5-cent proportional rate as long as it contained the milling-in-transit requirement.

The establishment of the 5-cent proportional rate resulted in the publication of through combination rates to the East which were lower than the rates for shorter distances from intermediate origins, causing violations of section 4. According to the railroads, it was believed that these fourth-section departures were protected by already outstanding relief (R. 143). Upon being advised by the Commission that this was not the case (R. 143), the railroads filed an application (R. 138-157) under section 4 to continue the existing rates and to establish and maintain additional rates which would also depart from the require-

---

[5] The protest of the Board of Trade, and its evidence before the Commission, also raised issues concerning other types of discrimination against Chicago grain interests, such as the limitation of transit privileges to a small select group of commodities produced by the Kankakee processor, the restriction of routing privileges, and the failure of applicants to publish the 5-cent proportional rate to Chicago, the barge-unloading port, which was the competition applicants were professing to meet. (See, *e.g.*, R. 180, 183, 191-194, 799, 813, 817-818)

An understanding of these types of discrimination requires a thorough knowledge of the detailed and complex provisions of the transit tariffs. Since the failure of the Commission to consider the Board of Trade's contentions with respect to these types of discrimination raises the same legal issue as the Commission's failure to consider the Board of Trade's contention with respect to the milling-in-transit requirement, only the latter issue is dealt with in this brief and the other types of discrimination will not be further considered here.

The Board of Trade also alleged that the rates violated section 1 of the Act and the national transportation policy. (R. 188-190, 197)

ments of section 4. This application was filed June 27, 1957. The additional proposed rates were filed to become effective July 30, 1957, but were later voluntarily postponed to become effective August 29, 1957.

PROCEEDINGS BEFORE THE COMMISSION

Notice of the filing of FSA 33955 was given by the publication of a summary of the application in the July 6, 1957, issue of the Federal Register, 22 F.R. 4773. That part of the notice relating to FSA 33955 is set forth in full in Appendix C. There was nothing in the notice that indicated that the Commission's investigation into the matter was to be limited in any respect, or that the protests were to be limited in any way. On the contrary, it was indicated that protests "must be prepared in accordance with rule 40 of the General Rules of Practice (49 CFR 1.40)." There was nothing in rule 40 that restricted in any way the grounds on which such an application could be protested. Rule 40 merely provided that the protest should "set forth specifically the grounds on which it is made and contain a concise statement of the interest of the protestants in the proceeding." Also, the rule governing fourth-section applications provided that "It is the uniform practice of the Commission to hold hearings upon the request of any interested party."[6]

A timely protest to the granting of the fourth-section relief sought was filed by the Board of Trade (R. 177-233).

---

[6] Rule XVIII, par. (f) of the Commission's rules of practice as revised to April 1, 1936. This rule apparently had its origin in FSO No. 8900, 88 I.C.C. 765 (1924). When the Commission reissued its rules of practice in 1942, the provisions respecting fourth-section applications were omitted, but the requirements of Rule XVIII continued to be observed by the Commission. *Rules to Govern Filing of Fourth Section Applications,* 310 I.C.C. 275, 276 (1960).

The Board of Trade also filed a petition for suspension of the additional proposed rates (R. 113-122). Several other parties filed similar protests and petitions for suspension.

The Board of Trade's protest against the granting of fourth-section relief (R. 177-233) was prepared in accordance with rule 40 of the Commission's rules of practice. This protest put the Commission and the applicants on notice of the contentions which would be made by the Board of Trade. It set forth the interest of the Board of Trade (R. 177). It clearly pointed out the discrimination caused by the milling-in-transit restriction which limited the rates to apply on corn products and not on whole corn and pointed out that this was a violation of section 3 (R. 179, 181, 186, 189, 197). The Board of Trade prayed that a public hearing be assigned at Chicago "for the purpose of permitting all shippers and interested parties to appear and fully present their case in opposition" to the application (R. 197).

In its reply to the Board of Trade's protest, the NYC admitted that "anomalies" were caused by the milling-in-transit requirement and it indicated that this requirement would be cancelled and that the Board of Trade had been so advised (R. 256).

On August 27, 1957, the Commission's Fourth Section Board entered its FSO No. 18784 (R. 88-89) granting *temporary* fourth-section relief "until the effective date of the further order to be entered after hearing in fourth-section application No. 33955 as amended." The Commission also declined to suspend the proposed additional rates (R. 87, 90). After a period when the rates were under

a temporary restraining order, they all became effective November 28, 1957.[7]

On October 16, 1957, the Commission entered its order (R. 92-93) assigning FSA No. 33955 for hearing on December 4, 1957, which date was later postponed to January 29, 1958 (R. 93-94). None of the hearing notices indicated that the hearing was to be restricted or limited in any way. At the very outset of the hearing, Mr. J. S. Chartrand, who appeared for the Board of Trade, stated (R. 292):

> Now with regard to statement of position, I did not fall in one category wholly nor in the other. It might be stated in this manner, that we are in sympathy with

[7] On August 28, 1957, Mechling and another shipper commenced an action in the United States District Court for the Northern District of Illinois to set aside and enjoin the Commission's temporary FSO No. 18784, and on that date an order temporarily restraining the enforcement and operation of the order was obtained. (*A. L. Mechling Barge Lines Inc.* v. *United States*, Civil Action No. 57 C 1450.) On September 25, 1957, the Board of Trade was permitted to intervene as a party plaintiff in that action. Thereafter the United States and the Commission filed a motion to vacate the temporary restraining order and to dismiss the complaint "for lack of jurisdiction of the subject matter for the reason that the action of the Commission complained of in the complaint is vested exclusively within the power and scope of authority of the Commission and therefore are not orders which are subject to review by this Court." On November 28, 1957, the three-judge district court, without opinion, and without the entry of any findings of fact, granted the motion of the United States and the Commission, dismissed the complaint "for want of jurisdiction," and vacated the temporary restraining order. Although such action was clearly in error (*Baltimore and O. R. Co.* v. *United States*, 264 U.S. 258, 263, 264; *Dixie Carriers* v. *United States*, 143 F. Supp. 844, 853-854; *Mechling Barge Lines* v. *United States*, 368 U.S. 324 (1961)), no appeal was taken from that order, plaintiffs being of the opinion that a decision after hearing on the merits could be obtained from the Commission before such an appeal could be heard and determined by the Supreme Court, a judgment which proved to be grossly erroneous. In other litigation, however, the Department of Justice and the Commission have since conceded that such an order, granting temporary fourth-section relief without supporting findings, is invalid. *Mechling Barge Lines* v. *United States*, 368 U.S. 324 (1961).

> the applicants here, but there are facets of this case which we feel violate other sections of the Act which causes us for those reasons to be opposed to it.

In due course, Mr. Chartrand presented testimony (R. 794-827) and submitted exhibits 42 through 63 in support of the Board of Trade's contentions that the rates for which relief was sought would violate sections 1 and 3 of the Act and the national transportation policy. No objections were made to his testimony or exhibits on the ground that such testimony or exhibits were not material and pertinent to the issues being investigated. The exhibits were received in evidence (R. 727).[8] The Examiner raised no questions concerning the relevance or materiality of the Board of Trade's evidence and did not indicate in any way that he considered the investigation to be confined to certain limited issues.

The principal witness for the applicants conceded (R. 367) that "the same competitive conditions apply to whole corn as apply to corn milled in transit," (R. 367) and, in an attempt to satisfy the Chicago interests, again promised that the NYC would take immediate steps to remove the discrimination against whole corn by removing the milling-in-transit requirement (R. 369). This promise was never carried out.

In its report dated June 8, 1960 (R. 9-29), Division 2 of the Commission concluded that the relief sought had been justified. With respect to the Board of Trade's contentions of discrimination against Chicago grain interests, Division 2 said (R. 26-27):

> The Chicago Board of Trade and others raise certain issues, principally discrimination against whole corn by the milling-in-transit limitation; discrimination

[8] The exhibits are part of the record on appeal but are not printed. By stipulation of the parties, they may be referred to.

against Chicago by the proposed-rate combination applying over Kankakee when prior thereto rates to the East were made over Chicago; undue preference to the processors of corn by the limitations in the application of the proposed rate to commodities shipped by these processors; and unreasonable routes on the proposed rate combination by the restrictive routes which apply over Kankakee in movements to eastern destinations. Although the New York Central intends to remove the milling-in-transit limitation, these issues do not directly deal with the fourth-section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings. However, since the proposed rates are effective over Chicago, that point has the same stature as all other corn processing points in official territory in their application. Moreover, the routes over Kankakee are the same as they were for many years prior to the establishment of the proposed rates, and while limited in their scope as compared to making the inbound rate break on Chicago, there is no indication of undue damage to Chicago.[9]

---

[9] The last two sentences quoted have nothing to do with the milling-in-transit requirement. They relate wholly to the restriction of transit privileges and routing. In addition to the discrimination against Chicago caused by the milling-in-transit requirement, the Board of Trade also contended that the limitation of routes and transit privileges via Chicago discriminated against Chicago. For reasons previously stated, that contention is not discussed in this brief. (See footnote 5, page 7). It should be stated, however, that, while the new Kankakee combinations *on corn products only* applied via some routes via Chicago, the routing and transit privileges were more "limited in their scope" than Chicago previously enjoyed. The Board of Trade's contention that the restriction of routes and transit privileges via Chicago also discriminated against Chicago was wholly separate and apart from its major contention that the milling-in-transit requirement discriminated against Chicago by restricting the reduced rates so that they would not apply on whole corn, thereby excluding Chicago grain interests from the source of supply of corn along the Kankakee Belt line and making it a private buying preserve for the Kankakee processor and a few other processors who could route their corn through Kankakee.

Petitions of the Board of Trade and others for reconsideration by the entire Commission of the report and order of Division 2 were denied (R. 31).

THE OPINION OF THE DISTRICT COURT

In spite of an extensive brief and reply brief filed by the Board of Trade, the lower court's treatment of the issues raised by the Board of Trade was very cursory. Its entire discussion of the Board of Trade's contentions is contained in the following portion of its opinion (R. 76-77):

> Plaintiffs claim error in the refusal of the Examiner and the Commission to admit evidence that the proposed rate was discriminatory, unjust and unreasonable, in violation of the Transportation Act; and that the rate failed to preserve the inherent advantage that the National Transportation Policy gives the water carrier. The evidence was excluded for the reason that it was not appropriate in this "Fourth Section" proceeding although it would be pertinent upon a complaint under Section 13(1) or a Commission investigation under Section 15(1).[10]
>
> Plaintiffs argue that the Examiner and Commission were bound not to grant the application under Section 4 if to do so involved violation of the other sections noted. We are referred to the Commission's conclusion that granting the application "would not be disharmonious with the other provisions of the Act," to show what the plaintiffs contend is an inconsistency.

---

[10] The statement of the district court (R. 76) that the Board of Trade claims error on the part of the Commission in refusing to admit evidence of discrimination and prejudice against Chicago is incorrect. The evidence was not excluded. What the Board of Trade claims is that the Commission was required to consider, before it could grant relief under section 4, whether the evidence which was admitted showed that the proposed rates would cause undue prejudice to Chicago grain interests in violation of section 3(1).

We may disregard that conclusion as surplusage and we see no error in the exclusion of the evidence of violation of other sections of the Act. The relief granted is permissive only and the evidence offered was not relevant in this Fourth Section proceeding. *United States* v. *Merchants & M. Traffic Ass'n*, 242 U.S. 178 (1916). Due regard was given to the policy and statutory scheme of the Act within the limits afforded by Section 4 and under that Section the Commission is not required to make specific ultimate findings that a rate is lawful and not discriminatory. The water carrier and other plaintiffs have failed to utilize the provisions of sections of the Act which afford the Commission the proper scope for such determination. *United States* v. *Merchants & M. Traffic Ass'n*, 242 U.S. 178, 188 (1916); *Koppers Co.* v. *United States*, 132 F. Supp., 159, 163 (D.C. Pa., 1955); *Florida Citrus Comm'n* v. *United States*, 144 F. Supp. 517, 526 (D.C. Fla., 1956); *Seatrain Lines* v. *United States*, 168 F. Supp. 819, 825 (D.C.N.Y., 1958).

SUMMARY OF ARGUMENT

Section 4 of the original Act to Regulate Commerce of February 4, 1887, 24 Stat. 380 (*infra*, pp. 18-19) prohibited the charging of any greater compensation in the aggregate for the transportation of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but it also provided that the Commission "in special cases, after investigation" might grant relief from this provision. The phrase "in special cases" was not defined in the statute.

In the first year of its existence, the Commission, in considering the meaning of section 4 in relation to the Act as a whole, held that the requirements of other sections of the Act pertaining to reasonableness and dis-

crimination apply just as much to investigations under section 4 as they do in other cases. *Re Louisville & N. R. Co.*, 1 I.C.C. Rep. 31, 1 Int. Com. Rep. 278 (1887).

The Mann-Elkins Act of June 18, 1910, amended section 4 by omitting therefrom the words "under substantially similar circumstances and conditions," thus making the long-and-short-haul clause an absolute prohibition against the charging of more for a shorter haul than for a longer, but it retained the provision that the Commission might "in special cases, after investigation" grant relief from this requirement. 36 Stat. 547-548.

In construing its power to grant relief under section 4, as amended, the Commission held that, in granting such relief, it must consider whether the rates sought to be established would be in conformity with other sections of the Act. *Railroad Commission of Nevada* v. *Southern P. Co.*, 21 I.C.C. 329 (1911); *City of Spokane* v. *Northern P. Ry. Co.*, 21 I.C.C. 400 (1911). The Commission's fourth-section orders granting relief in those cases were upheld in *Intermountain Rate Cases*, 234 U.S. 476, 485-486, wherein this Court, in dealing with the Commission's power to grant such relief, said that such power—

> . . . is made by the statute to depend upon the facts established and the judgment of that body in the exercise of a sound legal discretion as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned and in view of the preference and discrimination clauses of the second and third sections.

From that time to the present case, the Commission consistently held that it would not grant fourth-section relief to establish rates which would violate other sections of the Act, particularly sections 2 and 3. As late as September 28, 1959, Division 2 held that "we cannot grant relief from the long-and-short-haul provision to establish rates that may be in violation of other sections of the act, in

particular sections 2 and 3." *Nepheline Syenite from Ontario, Canada, to the East*, 308 I.C.C. 561, 565.

Less than nine months later, in its report here under consideration, Division 2—two members of which were still the same as in *Nepheline Syenite*—held (R. 26-27) that issues raised by the Board of Trade concerning discrimination against Chicago grain interests in violation of section 3 of the Act, and supported by evidence introduced at the hearing without objection, did "not directly deal with the fourth-section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings," and it declined to pass upon the issues raised by the Board of Trade. The Commission apparently overlooked the fact that, by the very terms of section 4, this was an "investigation" proceeding.[11]

In declining to pass upon such issues under section 3(1) of the Act, Division 2 misconstrued section 4(1), which clearly contemplates that the Commission's power to find that a "special case" exists which would justify relief from section 4 shall not be exercised to permit the establishment of rates which would be unreasonable, unjustly discriminatory, or unduly prejudicial, in violation of sections 1, 2, or 3 of the Act. Such interpretation of section 4 is not only compelled by the wording of the Act itself and by the national transportation policy (Appendix A, *infra*, p. 39), which requires that all sections of the Act shall be administered and enforced with a view to carrying out the policy of the Act against unjust discrimination, undue preferences or advantages or unfair or destructive competitive practices, but that is the only interpretation of section 4 which is consistent with sound and fair administrative practice. It would be wholly unjustified to require

[11] Three months after its decision in the present case, Division 2 again reverted to the Commission's historical position that it would not grant relief for the establishment of rates which would violate other sections of the Act. *Bituminous Fine Coal to La Crosse, Wis.*, 311 I.C.C. 257, 263 (1960).

appellant to file a formal complaint under section 13(1) and to go through another long and expensive proceeding just to raise the same issues of discrimination against Chicago grain interests; and it would be almost unconscionable to permit the railroads to maintain the unlawful rates during the additional five or six years such litigation could easily require.

There are no decisions of this Court which hold that affected shippers and communities cannot raise issues of discrimination in a section 4 investigation but must raise such issues by a separate complaint under section 13(1). *United States* v. *Merchants & M. Traffic Ass'n*, (the *Sacramento* case), 242 U.S. 178 (1916), relied on by appellees and the court below, did not so hold. It simply held that communities which were not parties to the fourth-section proceeding could not attack the orders in court but must seek a hearing by filing a complaint under section 13(1). Whether communities who were parties to the fourth-section investigation, who had already had a hearing and presented evidence of discrimination against them, could attack the order in court, was not involved in the *Sacramento* case.

The only support for the interpretation of section 4 urged by the railroads and adopted by the lower court comes from dicta in the decision of a three-judge district court in *Seatrain Lines* v. *United States*, 168 F. Supp. 819 (S.D. N.Y., 1958), where the court indicated that competing carriers and affected shippers and communities could not raise issues of discrimination under section 3 in an investigation under section 4 but must raise them by a separate complaint under section 13(1). The expressions of the district court on this point in *Seatrain*, which were not necessary to the decision of the case, the Commission's fourth-section order having been set aside on other grounds, were based upon a misconstruction and misinterpretation of the opinion of this Court in the *Sacramento* case.

ARGUMENT

I.

The Commission may not lawfully, over the protest of affected shippers and localities, authorize rail carriers to maintain rates which depart from the long-and-short-haul requirement of section 4 of the Interstate Commerce Act, without considering and determining whether such fourth-section-departure rates would violate section 3(1) of the Act by causing undue prejudice against such shippers and localities.

The question presented by this appeal has never been directly ruled on by this Court. However, in *Intermountain Rate Cases*, 234 U.S. 476, 485-486 (1914), this Court said that the Commission's power to relieve carriers from the long-and-short-haul requirement of section 4 of the Act:

> . . . is made by the statute to depend upon the facts established and the judgment of that body in the exercise of a sound legal discretion as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned and in view of the preference and discrimination clauses of the second and third sections.

In the *Intermountain Rate Cases*, the Court was concerned with the proper interpretation of section 4 as it had been amended by the Act of June 18, 1910, the Mann-Elkins Act, 36 Stat. 547-548. Section 4 of the original Act to Regulate Commerce of February 4, 1887, 24 Stat. 380, had provided:

> That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of

property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.

Shortly after its organization, the Commission considered the meaning of section 4 in its opinion in *Re Louisville & N. R. Co., (Re Southern Railway & Steamship Association)*, 1 I.C.C. Rep. 31, 1 Int. Com. Rep. 278 (1887). The Commission held in that case that, although their judgment was subject to the authority of the Commission and the courts to determine whether error had been committed, the carriers were the judge, in the first instance, with regard to the similarity or dissimilarity of circumstances and conditions, and if such circumstances and conditions were dissimilar, no application to the Commission was required.[12] The Commission reviewed the legislative history of section 4 in detail, and, on the construction of the Act as a whole, held that other sections of the Act with respect to reasonableness and discrimination

[12] On this point the Commission changed its position in *Georgia Railroad Commission* v. *Clyde Steamship Co.*, 5 I.C.C. Rep. 324, 4 Int. Com. Rep. 120, but when the subject reached this Court, it was held that the Commission's earlier interpretation was correct. *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U.S. 144 (1897).

apply just as much to investigations under section 4 as they do in other cases.

The Mann-Elkins Act of June 18, 1910, among other things, amended section 4 by omitting therefrom the words "under substantially similar circumstances and conditions." It also provided that no rates or charges lawfully existing at the time of the passage of that Act should be required to be changed prior to the expiration of six months after the passage of the Act nor in any case where application was filed with the Commission in accordance with the provisions of the Act until a determination of such applications was made by the Commission. 36 Stat. 547-548.

For many years prior to 1910 it had been a common practice of the rail carriers to make freight rates from the East to Pacific coast points lower than to intermountain territory because of the competition of the Atlantic-Pacific ocean carriers. Proceeding under section 4, as so amended, the railroads applied to the Commission for relief from section 4 in order to continue in effect the existing rates. The Commission held prolonged hearings on the applications, and, in two reports, granted to the carriers authority to depart from the long-and-short-haul requirement of section 4, but not to the same extent as sought by the carriers. *Railroad Commission of Nevada* v. *Southern P. Co.*, 21 I.C.C. 329 (1911); *City of Spokane* v. *Northern P. Ry. Co.*, 21 I.C.C. 400 (1911). In both of these cases, the Commission gave extensive consideration to its power, under the Act as amended, to relieve carriers from the requirements of section 4 and, in both cases, it held that, in granting such relief, it must consider whether the rates for which authority was sought would be reasonable, non-discriminatory, and non-prejudicial under sections 1, 2, and 3 of the Act.

Dealing with this subject, the Commission said, in the *Nevada* case (21 I.C.C. at 336, 338-339, 341):

> Now, the Congress has pursued, it seems to us, precisely the same theory in regard to the fourth section that it pursued in regard to the first, second, and the third sections. The fourth is but a definite continuation of the policy it was announcing throughout the whole act. Discriminations must stop, viz, undue discriminations. Preferences and advantages must be put an end to—those, to be sure, that are undue and unreasonable.
>
> . . . . . .
>
> The test which the Commission must now apply to determine whether the carrier may be given the advantage of an exception to the general rule of section four is the same test that it may apply with respect to any other discrimination or inequality. There is incorporated in section four every standard set up by Congress as a guide to this Commission which is to be found in any section of the act. And the leeway or discretion which may properly be exercised by this Commission under any other section may properly be exercised under this section. For instance, it is for us, acting within the limitations of the law, to determine what is a reasonable practice for a common carrier to pursue. This calls for the widest exercise of discretion. And if our judgment is arbitrary, or we transcend those limitations properly binding such a tribunal, our act may be set aside. . . .
>
> The Commission has not been left without a proper test to apply: The test of justness, of reasonableness, of discrimination, of preference and advantage; the test of fair play as between communities. With this construction of the statute, which is historically supported, as well as by those more or less variable measures known as the canons of statutory construction, the statute becomes both practicable and constitutional; we are neither forced to disregard it as a whole nor to eliminate any of its provisions; it does

not become an absolute long-and-short-haul section, because the proviso permitting of exceptions remains; the provisional clause does not relegate the entire section to the limbo of unconstitutionality, because we find that it may be administered in thorough harmony with the whole act, part of which it is; and the tests and standards to be applied are not matters of fancy, but are the express and positive words in the law itself. In short, Congress has undertaken to specify distinctly one practice which it wishes especially to destroy and charges this Commission not to permit it to obtain unless such discrimination, such preference, such practice may be shown not to be a discrimination that is unjust, a preference that is undue, or a practice that is unreasonable, because of peculiar facts and conditions.

. . . . . .

In dealing with this case we shall regard these propositions, therefore, as established:

. . . . . .

(2) That the proviso authorizing this Commission to permit exceptions to the general prohibition of the section is not a grant of arbitrary or absolute power, but its exercise must be limited and conditioned upon the presence in special cases of conditions and circumstances which would make such exceptions legal and proper and in no wise antagonistic to other provisions of the act.

In the *Spokane* case, the Commission said (21 I.C.C. at 412-413, 413-414, 415):

Bearing in mind the authority which the Commission now administers in prescribing a reasonable rate and in declaring and correcting an undue preference, it seems evident that the purpose of Congress was to commit to this body the duty of determining whether if the carrier was permitted to charge a higher rate at the intermediate point that would result in a violation of the provisions of the act. But in so doing the

Commission can not act arbitrarily. It must investigate each case, and if after such investigation it is of the opinion that a departure from the rule of the fourth section would not result in unreasonable rates or undue discrimination it must permit that departure. If, upon the other hand, it is of the contrary opinion, it must refuse the permission. Such is the only possible construction which can be put upon this section in connection with the entire act, and if any doubt as to the real purpose of Congress could exist, it must be effectively put at rest by an examination of the history of the passage of this measure.

. . . . . .

. . . it was provided that in every instance where the carrier desired to deviate from the rule of the section it should apply to the Commission, which should investigate and pass upon the propriety of the lower charge at the more distant point; but Congress did not intend to leave this to the mere whim of the Commission any more than it intended to permit arbitrary action where the question is upon the reasonableness of the rate or the undueness of a preference. This is clearly stated by Mr. Mann, chairman of the committee having the bill in charge in the House, who said in explaining the meaning of this section upon the floor:

> Remember, whatever the Commission does in respect to this matter, it is always bound by the act of Congress that rates shall be just and reasonable and that railroad companies shall not establish unjust and unreasonable rates, so that practically what we do here is to give the Commission power to say what in a particular case shall be a just and reasonable rate, although we declare as a general proposition that it shall be unjust and unreasonable to charge more for a short haul than for a long haul.

To the same import were the remarks of Senator Sutherland, who, when the conference report containing this proviso was before the Senate, said in answer to the objection that in its present form it was void as a delegation of legislative authority:

> When the Interstate Commerce Commission comes to pass upon an application from the railroad companies to be permitted to charge more for the short haul than for the long haul, or less for the long haul than for the short haul, would not the Interstate Commerce Commission itself violate the provisions of section 1 and section 3 that I have read if it did not determine the matter according to the rules laid down in those sections? In other words, must not the Interstate Commerce Commission, in passing upon this question, determine that the rates involved are reasonable, and that as adjusted they do not unjustly or unduly discriminate against any locality? Does not the general language in the law furnish the rule which the Interstate Commerce Commission must adopt in carrying out the provisions of this section?
>
> . . . . . .
>
> We hold that under the amended section it is the duty of the Commission to investigate each application made by a common carrier for leave to depart from the rule of the section. If we are of the opinion, upon a view of the entire situation, that to grant the application will not result in unjust or discriminatory rates and practices, then it should be granted; otherwise it should be denied; . . .

The Commission's orders in those cases were attacked in the courts and were sustained in *Intermountain Rate Cases*, 234 U.S. 476, *supra*. In its decision, the Court thoroughly considered the effect of the amendment made

to section 4 by the Mann-Elkins Act and said (234 U.S. at 485-486):

> From the failure to insert any word in the amendment tending to exclude the operation of competition as adequate under proper circumstances to justify the awarding of relief from the long and short-haul clause and there being nothing which minimizes or changes the application of the preference and discrimination clauses of the second and third sections, it follows that in substance the amendment intrinsically states no new rule or principle but simply shifts the powers conferred by the section as it originally stood; that is, it takes from the carriers the deposit of public power previously lodged in them and vests it in the Commission as a primary instead of a reviewing function. In other words, the elements of judgment, or so to speak the system of law by which judgment is to be controlled remains unchanged but a different tribunal is created for the enforcement of the existing law. This being true, as we think it plainly is, the situation under the amendment is this: Power in the carrier primarily to meet competitive conditions in any point of view by charging a lesser rate for a longer than for a shorter haul has ceased to exist because to do so, in the absence of some authority, would not only be inimical to the provision of the fourth section but would be in conflict with the preference and discrimination clauses of the second and third sections. But while the public power, so to speak, previously lodged in the carrier is thus withdrawn and reposed in the Commission the right of carriers to seek and obtain under authorized circumstances the sanction of the Commission to charge a lower rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved and if not is in any event by necessary implication granted. And as a correlative the authority of the Commission to grant on request the right sought is made by the statute to depend upon the facts established and the judgment of that body in the exercise of a sound legal discretion as

> to whether the request should be granted compatibly with a due consideration of the private and public interests concerned and in view of the preference and discrimination clauses of the second and third sections.

From the decision in *Intermountain Rate Cases*, in 1914, to the present time, this Court has never given any indication, contrary to that statement, that the Commission may ignore the matter of possible discrimination in violation of section 3 of the Act when granting fourth-section relief. The Commission itself, throughout all this period and up to the present case, has consistently followed the rule that it would not grant fourth-section relief for rates that would violate other sections of the Act, particularly sections 2 and 3, and has often cited this Court's decision in *Intermountain Rate Cases* as authority for that position. Excerpts from representative decisions of the Commission so holding are set forth in Appendix B, *infra*, pp. 42-47. Typical of the many expressions of the Commission is the following from *Commodity Rates to Pacific Coast Terminals*, 107 I.C.C. 421, 436 (1926):

> But before the relief from the operation of the fourth section which is here sought may be granted we must be satisfied that there would not thereby be created infractions of other provisions of the act, particularly those of section 3 prohibiting undue or unreasonable preference or advantage of or prejudice or disadvantage to persons or localities.

As late as September 28, 1959, Division 2 of the Commission—two members of which were also on Division 2 when it decided the present case—held in *Nepheline Syenite from Ontario, Canada, to the East*, 308 I.C.C. 561, 565, that

> . . . we cannot grant relief from the long-and-short-haul provision to establish rates that may be in violation of other sections of the act, in particular sections 2 and 3. See *Intermountain Rate Cases*, 234 U.S. 476.

Yet, less than nine months later, Division 2 held in the present case (R. 27) that questions of discrimination against Chicago grain interests "do not directly deal with the fourth-section principles here involved." The Division did not even refer to any of its earlier cases where it had specifically held to the contrary; it did not cite any court authority, and it gave no reasons for this change of position. In September, 1960, again without discussion or explanation, Division 2 reverted to the historical position of the Commission that "we may not grant relief to establish rates that may be in violation of other sections of the Act." *Bituminous Fine Coal to La Crosse, Wis.*, 311 I.C.C. 257, 263 (1960).

In holding that the Board of Trade's allegations of discrimination against Chicago did not "directly deal with the fourth-section principles here involved," the Commission did not define what it considered to be "the fourth-section principles here involved." In support of the Commission's order, the railroads argued that all they needed to establish to justify fourth-section relief was that they were confronted by actual water competition and that the rates they proposed for the longer hauls were reasonably compensatory. The lower court evidently agreed with that theory, holding (R. 77) that evidence as to the discriminatory character of the rates "was not relevant in this Fourth Section proceeding," and that the Commission gave due regard "to the policy and statutory scheme of the Act within the limits afforded by Section 4."

From the original enactment of section 4 in 1887, the Commission has been authorized to relieve carriers from the requirements of section 4 "in special cases." While the meaning of that phrase is not defined in the Act, it is quite clear from the decisions of this Court and from the decisions of the Commission itself that no case can con-

stitute a "special case" justifying relief from the requirements of section 4 if the rates for which such relief is sought would violate sections 1, 2, or 3 of the Act.

When the rail carriers argue that all they need to show to constitute a "special case" justifying relief under section 4 is the presence of actual water competition and the fact that their proposed rates are reasonably compensatory, they are relying on language that was not even added to section 4 until 1920 by section 406 of the Transportation Act, 1920, 41 Stat. 480. That act added to section 4 the following provision:

> . . . but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; . . . and no such authorization shall be granted on account of merely potential water competition not actually in existence: . . .

Quite obviously, the rail carriers, in order to establish a special case justifying relief based on water competition, must show that they are confronted with actual water competition and that their proposed rates are reasonably compensatory, but there is no basis for holding that that is all they need to show.

If there were any doubt about the proper construction of section 4 prior to 1940—and, we submit, there can be no such doubt—certainly there cannot be any doubt since 1940, when Congress enacted its national transportation policy, 54 Stat. 899 (Appendix A, p. 39). That declaration provides that it is the policy of Congress to encourage the establishment and maintenance of reasonable charges for transportation service, "without unjust discrimination, undue preferences or advantages, or unfair or destructive

competitive practices" and provides that "All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." That declaration does not say that all of the provisions of the Act except section 4 shall be so administered and enforced; it says *all* of the provisions of the Act. When that policy specifically provides that *all* of the provisions of the Act shall be administered and enforced with a view to carrying out the policy of the Act as a whole, there cannot possibly be any legal basis for saying, as did the lower court, that the Commission gave due regard to the policy and statutory scheme of the Act "within the limits" of section 4. Section 4 has no such limitations, either expressed or implied.

The interpretation of section 4 here urged by the Board of Trade is not only compelled by the clear language of the Act, but it is also the only interpretation of section 4 which is consistent with sound and fair administrative practice. The Commission held a lengthy hearing on the carriers' application for fourth-section relief. The hearing lasted for five days. The transcript of testimony before the Commission extended to 852 pages and 65 exhibits were received in evidence. The Board of Trade's witness presented evidence relating to the discrimination against Chicago (R. 794-827) and no question was raised about his right to present such evidence. And, while the carriers argue that all they need to show is the presence of actual water competition, their own witness conceded (R. 367) that "the same competitive conditions apply to whole corn as apply to corn milled in transit." The rail carriers seek to require the Board of Trade to file another complaint and go through another lengthy Commission proceeding in order to compel the rail carriers to accord whole corn equality of treatment with corn products, in

spite of the fact that their witness conceded that "the same competitive conditions apply to whole corn as apply to corn milled in transit," and in spite of the fact that they promised to take immediate steps to remove the milling-in-transit requirement, a promise which the Commission referred to in its report (R. 26-27), but which was never carried out.

Furthermore, to permit the maintenance by the rail carriers of these unlawful rates for another five or six years pending the trial and disposition of another proceeding would be very unfair. The rates involved have now been in effect since December 15, 1956. For eight months they were in effect in violation of section 4 without any outstanding relief. For three months they were under a temporary restraining order, then for two years and seven months they were in effect by virtue of a "temporary" fourth-section order of a kind which both the United States and the Commission have since conceded is invalid. Since June 8, 1960, they have been in effect by virtue of the order under attack in this case. If that order is invalid, as appellant alleges, it should be set aside and enjoined at the earliest moment and the unlawful rates should be required to be withdrawn pending proper consideration by the Commission of appellant's contentions that such rates cause undue prejudice to Chicago grain interests in violation of section 3(1) of the Act.

II.

The cases relied on by the court below do not support its interpretation of section 4 of the Act.

Four cases were relied on by the court below in support of its holding (R. 77) that the Board of Trade's contentions of discrimination against Chicago grain interests were "not relevant in this Fourth Section proceeding," and that the

Commission gave due regard "to the policy and statutory scheme of the Act within the limits afforded by Section 4." Two of those cases are not even remotely pertinent to the issue here presented.[13]

One of the cases relied on by the court below was *United States* v. *Merchants & M. Traffic Ass'n* (the *Sacramento* case), 242 U.S. 178 (1916), which was a sequel of the decision in *Intermountain Rate Cases*, 234 U.S. 476 (1914), *supra*. Prior to 1910, when it had been the common practice of the rail carriers to make freight rates from the East to Pacific coast points lower than to intermountain territory (*supra*, p. 20), many interior cities near the coast had been granted the same transcontinental rates as the ports of San Francisco and Oakland because the competing water carriers customarily absorbed the local rates or charges from the ports to those cities. Among those interior cities were the cities of Sacramento, Stockton, San Jose, and Santa Clara, Calif. Those cities had taken no part in the proceedings prior to the decision in *Intermountain Rate Cases*.

Following the decision in *Intermountain Rate Cases*, some modifications were proposed by the carriers and additional hearings were had in which many shippers (but not the cities of Sacramento, Stockton, San Jose, and Santa Clara) participated. Changes in conditions occurring since

---

[13] *Koppers Co.* v. *United States*, 132 F. Supp. 159, 163 (W.D. Pa., 1955); *Florida Citrus Commission* v. *United States*, 144 F. Supp. 517, 526 (N.D. Fla., 1956). Neither of those cases involved the requirements of section 4 of the Act. In both of those cases the court simply declined to set aside a Commission order in a "general revenue increase" case, saying that the remedy of a person aggrieved by such an order was under section 13(1) or section 15(1) of the Act. The situation here is entirely different. The present case is not a "general revenue increase" case. It is a specific "rate" case, in which the Commission has authorized particular rates which result in undue prejudice to some shippers and undue preference of others.

the entry of the original order on July 31, 1911, were considered, among them being that the ocean carriers had discontinued the practice of absorbing the rates from the ports to the interior cities. A new plan for constructing back-haul rates developed by the Commission was embodied in an amended fourth-section order. Following the limitation imposed by that amended order, the railroads' tariff confined the low terminal rates to such ports as San Francisco and Oakland, and the interior cities including Sacramento, Stockton, San Jose and Santa Clara were subjected to rates materially higher than to San Francisco and Oakland, though much lower than the rates to intermountain territory. Representatives of the four cities then applied to the Commission for a "rehearing," and, when their application was denied, they brought suit in the district court to restrain the enforcement of the amended order.

This Court held that the four complaining cities, who were not parties to the Commission investigation, could not attack the Commission's order in court and that, in seeking a "rehearing" in the fourth-section proceeding before the Commission, those cities had mistaken their remedy, and what they should have done was to file a complaint under section 13 of the Act. In so holding, this Court said (242 U.S. at 188):

> For the order is permissive merely. The carrier is the only necessary party to the proceeding under § 4. The Commission represents the public. While it is proper and customary for communities or shippers interested to participate in hearings held, there is no provision for notice to them. They are not bound by the order entered; at least in the absence of such participation. And if the rates made by tariffs filed under the authority granted seem to them unreasonable, or unjustly discriminatory, §§ 13 and 15 afford ample remedy. Respondents contend that, after the amended order was entered and the tariffs filed, they

> did apply to the Commission for relief "but were denied the right of a hearing" and that "their protest and demand were ignored and denied." What they did was to petition for a "rehearing" in the proceedings under the Fourth Section, to which they now say they were not parties, instead of applying for redress under § 13, as they had a legal right to do. They mistook their remedy. To permit communities or shippers to seek redress for such grievances in the courts would invade and often nullify the administrative authority vested in the Commission; . . .

The carriers rely on that language to support their argument that questions of discrimination are not relevant in fourth-section investigations but, we submit, that language is subject to no such interpretation. That decision simply holds that persons who were not parties to a fourth-section investigation, but who applied to the Commission for a "rehearing" which was denied, did not have the right to attack the order in the courts because they had not exhausted their proper administrative remedies by the filing of a complaint under section 13 as they were entitled to do. That decision neither holds nor implies that persons who are parties to a fourth-section investigation cannot attack the order in the courts until they have filed a separate complaint under section 13 and presented the same evidence all over again. Unlike the cities of Sacramento, Stockton, San Jose, and Santa Clara, the Board of Trade is not seeking "redress for [its] grievances in the courts." It is simply asking the Court to require the Commission to properly construe and apply section 4 so that the Board of Trade can obtain redress for its grievances before the Commission in the proceeding which has already been heard.

Seatrain Lines v. *United States*, 168 F. Supp. 819 (S.D. N.Y., 1958), also relied on by the court below (R. 77), was an action brought by a competing water carrier to set

aside and enjoin a permanent fourth-section order of the Commission, entered without a hearing, allowing rail carriers to depart from the long-and-short-haul provision of section 4 of the Act and to charge less for the transportation of articles between eastern points of origin and southwest Gulf ports than was charged to intermediate inland points. The three-judge district court set aside and enjoined the order on the ground that it lacked the necessary supporting findings of fact. One of the contentions made by the plaintiff water carrier, Seatrain, was that the rates for which authority was sought discriminated against it. Although not necessary to the decision in the case, the district court held as follows on that contention (p. 824):

> However, Section 4 does not contemplate that there shall be a determination in a Section 4 proceeding as to whether the rates charged are unduly discriminatory against a competing water carrier. This question must be raised by proceedings under Sections 13 and 15 of the Interstate Commerce Act. In such proceedings a hearing must be held at which all parties affected, carriers, shippers and communities, can be heard and their respective interests appropriately weighed and balanced by the Commission.
>
> Thus, in so far as the plaintiff claims discrimination against it resulting from the new authorized rates, it has not exhausted its administrative remedies because it has not petitioned for a hearing under Sections 13 and 15 at which such claims would be determined.

The foregoing dicta of the three-judge district court in the *Seatrain* case are the only expressions of any court of which we have knowledge that even remotely indicate that the Commission, in granting fourth-section relief, need not consider whether the rates for which authority is sought would cause undue prejudice to protesting parties

in violation of section 3 of the Act. The decision of the district court was not appealed. Since Seatrain succeeded in setting aside the order on other grounds, there was no reason for it to appeal. Neither the railroads, the Commission, nor the United States appealed, and the Commission reopened the proceeding for a hearing.

On this point, the *Seatrain* opinion contains no independent discussion or reasoning and the only citation of authority is to the *Sacramento* case. It seems apparent that the district court's erroneous interpretation of the requirements of section 4 in the *Seatrain* case was based upon a misconstruction or misinterpretation of the opinion of this Court in the *Sacramento* case. This is borne out by the following portions of the district court's opinion in *Seatrain* (168 F. Supp. 819, 824, 825):

> Mr. Justice Brandeis' opinion in *United States* v. *Merchants' & Manufacturers' Traffic Ass'n*, 242 U.S. 178, 37 S.Ct. 24, 61 L.Ed. 233, on which defendants heavily rely, merely holds that Fourth Section orders are not reviewable as to their discriminatory effect on particular communities and that communities claiming such discrimination are relegated to appropriate proceedings under Sections 13 and 15. But the case does not hold that Fourth Section orders are not reviewable on the question of whether the procedures required by Section 4 have been followed and whether they are lawful and proper under that section.
>
> . . . . . .
>
> As Mr. Justice Brandeis pointed out in *United States* v. *Merchants & Manufacturers Traffic Ass'n*, *supra*, Fourth Section approval by the Commission is permissive only. The Commission is called upon to determine only the limited questions of whether this is a "special case" and whether the proposed rates are "reasonably compensatory". All questions as to the effect of the rates upon competing carriers, ship-

pers and affected communities are reserved for determination in proceedings under Sections 13 and 15 where a "hearing" is expressly required.

This Court in the *Sacramento* case did not hold "that Fourth Section orders are not reviewable as to their discriminatory effect on particular communities and that communities claiming such discrimination are relegated to appropriate proceedings under Sections 13 and 15." What this Court held was that communities *which were not parties* to the Commission investigation could not obtain court review of the order. The question of whether communities which were parties to the Commission investigation could obtain such court review was not involved in the case. And, we submit, there is no language in this Court's opinion which indicates that investigations under sections 13 or 15 are more "appropriate" for determining whether rates for which fourth-section relief is sought would unduly discriminate against affected communities than the "investigation" specifically required by section 4.

There is not only no indication in this Court's opinion that the determination of whether a "special case" exists is a "limited" question, but the contrary clearly appears. In referring to that clause, giving the Commission power to grant fourth-section relief "in special cases," this Court said in the *Sacramento* case (242 U.S. at 187):

> The clause in Amended Fourth Section which declares "That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances" was designed to guard against the issue, by the Commission, of general orders suspending the long and short haul clause, and to ensure action by it separately in respect to particular carriers and only after consideration of the special circumstances

existing. Whenever such consideration has been given —"the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of the section."

There is no indication in this Court's opinion that the "consideration" which the Commission must give to "the special circumstances existing" is, in any way, to be a "limited" consideration of only a few of the circumstances. The Commission must consider all the special circumstances existing, including the discrimination against protesting parties. As shown in section I of this brief, the term "special case," as interpreted by the Commission and the courts, has always implied that the rates for which relief is sought would not violate other sections of the Act. Nor could the district court in *Seatrain* properly rely on this Court's opinion in the *Sacramento* case as authority for holding that the Commission, in a fourth-section investigation, need consider only whether the proposed rates are "reasonably compensatory," for, as has been already shown (*supra*, p. 28), that clause was not even added to section 4 until after the *Sacramento* case was decided.

Insofar as the *Seatrain* decision expresses the opinion that questions of discrimination against affected communities and shippers who have protested the rates and submitted evidence in a fourth-section investigation need not be considered in that proceeding, it is plainly wrong. There is no support in the decisions of this Court for any such proposition, and no valid reasons can be given to support the adoption of any such rule.

CONCLUSION

For the reasons herein set forth, the judgment of the court below should be reversed with directions to set aside and permanently enjoin the Commission's Fourth Section Order No. 19346 and to remand the case to the Commission for further proceedings in accordance with the requirements and provisions of the law and the opinion of this Court.

Respectfully submitted,

HAROLD E. SPENCER
RICHARD M. FREEMAN
One North LaSalle Street
Chicago 2, Illinois
Counsel for Board of Trade of the City of Chicago, Appellant

BELNAP, SPENCER, HARDY & FREEMAN
One North LaSalle Street,
Chicago 2, Illinois
Of Counsel

December 14, 1963

APPENDIX A

The national transportation policy, 54 Stat. 899 (49 U. S. C. preceding § 1) and the Interstate Commerce Act, 24 Stat. 379, as amended, (49 U.S.C. § 1 *et seq.*) provide as follows:

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

* * * * *

SEC. 3(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or ad-

vantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * * * *

SEC. 4(1) It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit

the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: . . .

* * * * *

SEC. 13(1). That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

APPENDIX B

Representative decisions of the Commission reflecting its historical position that it will not authorize the establishment and maintenance of rates which do not conform to the requirements of section 4 of the Act if such rates would violate other sections of the Act are as follows:

> Now, the Congress has pursued, it seems to us, precisely the same theory in regard to the fourth section that it pursued in regard to the first, second, and the third sections. The fourth is but a definite continuation of the policy it was announcing throughout the whole act. Discriminations must stop, viz, undue discriminations. Preferences and advantages must be put an end to—those, to be sure, that are undue and unreasonable.
>
> . . . . . .
>
> The test which the Commission must now apply to determine whether the carrier may be given the advantage of an exception to the general rule of section four is the same test that it may apply with respect to any other discrimination or inequality. There is incorporated in section four every standard set up by Congress as a guide to this Commission which is to be found in any section of the act. And the leeway or discretion which may properly be exercised by this Commission under any other section may properly be exercised under this section. For instance, it is for us, acting within the limitations of the law, to determine what is a reasonable practice for a common carrier to pursue. This calls for the widest exercise of discretion. And if our judgment is arbitrary, or we transcend those limitations properly binding such a tribunal, our act may be set aside. . . .
>
> The Commission has not been left without a proper test to apply: The test of justness, of reasonableness, of discrimination, of preference and advantage; the test of fair play as between communities. With this construction of the statute, which is historically sup-

ported, as well as by those more or less variable measures known as the canons of statutory construction, the statute becomes both practicable and constitutional; we are neither forced to disregard it as a whole nor to eliminate any of its provisions; it does not become an absolute long-and-short-haul section, because the proviso permitting of exceptions remains; the provisional clause does not relegate the entire section to the limbo of unconstitutionality, because we find that it may be administered in thorough harmony with the whole act, part of which it is; and the tests and standards to be applied are not matters of fancy, but are the express and positive words in the law itself. In short, Congress has undertaken to specify distinctly one practice which it wishes especially to destroy and charges this Commission not to permit it to obtain unless such discrimination, such preference, such practice may be shown not to be a discrimination that is unjust, a preference that is undue, or a practice that is unreasonable, because of peculiar facts and conditions.

* * * * *

In dealing with this case we shall regard these propositions, therefore, as established:

* * * * * *

(2) That the proviso authorizing this Commission to permit exceptions to the general prohibition of the section is not a grant of arbitrary or absolute power, but its exercise must be limited and conditioned upon the presence in special cases of conditions and circumstances which would make such exceptions legal and proper and in no wise antagonistic to other provisions of the act. *Railroad Commission of Nevada* v. *Southern P. Co.*, 21 I.C.C. 329, 336, 338-339, 341 (1911).

* * * * * *

It goes without saying that carriers should not propose rates or rate structures for approval in a fourth-section application which create infractions of other provisions of the interstate commerce act, and

particularly of section 3. *Transcontinental Cases of 1922*, 74 I.C.C. 48, 71 (1922).

* * * * *

But before the relief from the operation of the fourth section which is here sought may be granted we must be satisfied that there would not thereby be created infractions of other provisions of the act, particularly those of section 3 prohibiting undue or unreasonable preference or advantage of or prejudice or disadvantage to persons or localities. *Commodity Rates to Pacific Coast Terminals*, 107 I.C.C. 421, 436.

* * * * *

To paraphrase the language of the Supreme Court, in the exercise of a sound legal discretion we may grant permission to charge higher rates at the intermediate points upon the ground that such rates are part of an established group adjustment, if we are satisfied that this is compatible "with a due consideration of the private and public interests concerned and in view of the preference and discrimination clauses of the second and third section," and, no doubt, of the provisions of the first section also. *Commodity Rates On Lumber and Other Forest Products*, 165 I.C.C. 561, 569 (1930).

* * * * *

It is well settled that sections 3 and 4 should be so construed as to cause them to operate harmoniously. *Differential Routes To Central Territory*, 211 I.C.C. 403, 421 (1935).

* * * * *

It is well settled that we will not authorize fourth-section relief where the proposed rate structure would create infractions of other provisions of the act. Thus, where any doubt appears, the burden is upon applicants to show that the proposed rate structure would not result in any unlawful situations. *Bituminous Coal To Buffalo, N. Y.*, 219 I.C.C. 554, 560.

* * * * *

Water competition has long been recognized as creating a special case in which relief may be granted from the provisions of section 4. *Intermountain Rate Cases*, 234 U.S. 476. However, the relief from that section cannot be granted to establish rates that may be in violation of other sections of the act. *Pig Iron To Butler, Pa.*, 222 I.C.C. 1, 2 (1937).

* * * * *

Our authority to grant relief from the provisions of section 4 is limited to "special cases." A special case which might justify fourth-section departures upon grounds of market or other competitive conditions, contemplates that such departures will not result in violations of other provisions of the act; particularly section 3. On this record, we conclude that applicants have failed to sustain the burden which rests upon them to prove that the proposed rates would not create infractions of provisions of the act other than section 4. In the circumstances, we find that sufficient justification has not been shown to warrant the approval of the relief sought. Accordingly, the application will be denied. An appropriate order will be entered. *Iron and Steel To Minnesota*, 231 I.C.C. 425, 428 (1939).

* * * * *

The record contains uncontradicted evidence submitted on behalf of the Chicago intervener that the reduction of the rates from Janesville to Evanston, and not to points in the Chicago district, would unduly prefer the Evanston dealer and unduly prejudice Chicago dealers in competing for business both in Evanston and in the Chicago district.

We find that sufficient justification for the relief prayed by this application No. 17453 has not been presented, and accordingly it will be denied. *Sand and Gravel to Northfield and Evanston, Ill.*, 234 I.C.C. 65, 68 (1939).

* * * * * *

It is clear that the suspended rates would result in violations of section 3 of the act. In their brief, the western trunk-line respondents suggest that such

situations should be handled in separate proceedings. Ordinarily, adjustments which invite further controversy must be viewed with disfavor.

We find that the proposed rates have not been shown to be just and seasonable, and that they would result in violations of section 3 of the act. An order will be entered requiring their cancellation and discontinuing the proceedings. The fourth-section applications will be denied. *Iron and Steel from Minnequa to Kans., Neb., S. Dak.*, 278 I.C.C. 163, 168-169 (1950).

* * * * *

In the administration of section 4 of the act, the Commission has adopted the view that relief from the provisions thereof should be granted where necessary to enable a carrier to retain or secure traffic which otherwise would move over another route, provided the rates established for that purpose do not conflict with other provisions of the act, and are not contrary to the public interest. *Coal and Coal Briquets in the South*, 289 I.C.C. 341, 376-377 (1953).

* * * * *

When fourth-section relief is granted it should be compatible with the affected interests and with the provisions of the Interstate Commerce Act. *Passenger Fares, Hell Gate Bridge Route, New York, N.Y.*, 296 I.C.C. 147, 153 (1955).

* * * * *

The protestant meets the same competition at Lake Charles that is encountered by the grinders at Houston and Corpus Chirsti. The evidence is convincing that the proposed rate would result in undue prejudice to the protestants and in undue preference of shippers and receivers under the proposed rate.

In view of the conclusion reached with respect to the proposed schedules, a further discussion of the fourth-section application is unnecessary. *Crude Barytes Ore, Mo. to Corpus Christi and Houston*, 299 I.C.C. 505, 508 (1956).

* * * * *

The rail carriers have the right to meet competition in whatever form it may arise, provided that the rates do not contravene any provision of the act, and we may, subject to certain conditions, grant relief from the operation of the long-and-short-haul provision of section 4 of the act with respect to such rates. The first part of section 4(1) of the act is devoted to expressing the general prohibition against charging more for a shorter than for a longer haul over the same line or route, the shorter being included in the longer distance, and also against charging greater compensation as a through rate than the aggregate of intermediate rates. However, as indicated, it is within our power to relieve the carriers from the operation of this general prohibition, upon application by them and investigation of the matter by us, but only in special cases and only after finding that the charge to the more distant point is reasonably compensatory for the service performed.

The first question to be resolved is whether the situation presented falls within the category of a special case. Competition has always been the principal "special case" which we have recognized in granting relief. Although this be true, the existence of competition does not *ipso facto* entitle an applicant to relief. The competition relied upon must always be examined in relation to the existing circumstances, bearing in mind that we cannot grant relief from the long-and-short-haul provision to establish rates that may be in violation of other sections of the act, in particular sections 2 and 3. See *Intermountain Rate Cases*, 234 U. S. 476. *Nepheline Syenite from Ontario, Canada, to the East*, 308 I.C.C. 561, 564-565 (1959).

* * * * *

The competition relied upon must be examined in relation to the existing circumstances, bearing in mind that we may not grant relief to establish rates that may be in violation of other sections of the act. *Bituminous Fine Coal to La Crosse, Wis.*, 311 I.C.C. 257, 263 (1960).

APPENDIX C

NOTICE APPEARING IN THE FEDERAL REGISTER FOR JULY 6, 1957, 22 F.R. 4473

INTERSTATE COMMERCE COMMISSION

FOURTH-SECTION APPLICATIONS FOR RELIEF

July 2, 1957.

Protests to the granting of an application must be prepared in accordance with Rule 40 of the General Rules of Practice (49 CFR 1.40) and filed within 15 days from the date of publication of this notice in the FEDERAL REGISTER.

LONG-AND-SHORT HAUL

* * * * *

FSA No. 33955: *Corn and products—Illinois points to eastern points.* Filed by O. E. Schultz, Agent, for interested rail carriers. Rates on corn, and corn products, carloads from specified points in Illinois to Kankakee, Ill., and from Kankakee to specified points in central territory, western termini of eastern trunk lines in New York, Pennsylvania and West Virginia, and points east thereof in trunk line and New England territories.

Grounds for relief: Truck-barge-truck competition via Chicago, Ill., and circuitous routes.

Tariff: New York Central Railway Company's tariff I.C.C. 1169, supplement No. 126.